

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED
February 22, 1999
WARREN GENERAL SESSIONS
6048 GSWC
Cecil W. Crowson
Appellate Court Clerk

CRAIG R. PITMON	}	WARREN GENERAL SESSIONS
	}	No. Below 6048 GSWC
Plaintiff/Appellee	}	Cecil W. Crowson
	}	Appellate Court Clerk
vs.	}	Hon. Barry Medley
	}	Judge
	}	
	}	No. 01S01-9801-GS-00011
RELIANCE INSURANCE	}	
COMPANY	}	
	}	
Defendant/Appellant	}	MODIFIED AND REMANDED

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by plaintiff/appellee, for which execution may issue if necessary.

IT IS SO ORDERED on February 22, 1999.

PER CURIAM

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. Reliance Insurance Company, the employer's insurer, contends the trial judge used an incorrect compensation rate and that the award of permanent partial disability benefits is excessive. As discussed below, the panel has concluded the judgment should be modified.

The employee or claimant, Pitmon, initiated this civil action for disability and medical benefits. After a trial of all the issues, the trial judge awarded, *inter alia*, permanent partial disability benefits based on fifty percent to the body as a whole and applied a compensation rate of \$364.63 per week. Appellate review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 926 (Tenn. 1995).

At the time of the trial, the claimant was 28 years old and a high school graduate with some college and experience in the construction industry. He suffered a low back injury in February of 1995 while working for Davidson Design and Construction. He is capable of reading blueprints, bidding on construction projects and performing cost analyses.

He was treated by Dr. Arthur Cushman, a board certified neurosurgeon, who diagnosed a herniated disc at L 4-5. When conservative care failed to relieve the claimant's symptoms, the doctor performed a laminectomy and discectomy on May 31, 1995 and, after a period of recovery, assessed his permanent impairment rating at eight percent to the whole body. Dr. Timothy Schoettle, another neurosurgeon, examined the claimant and assessed a permanent impairment rating of ten percent to the whole body.

During the trial, the claimant demonstrated his limitations by bending forward, backward and sideways. He testified to a number of tasks he was unable to perform. He has attended Motlow College and Middle Tennessee State University but did not earn the degree he was seeking. A vocational expert estimated his disability eliminates him from consideration for approximately two-thirds of the jobs for which he is otherwise qualified. After surgery, he worked briefly as a deliverer for Domino's Pizza, but quit because continually getting in and out of a car, along with bending and squatting, rendered him unable to continue. He has not done any other work since the surgery and has not returned to his pre-injury work.

For injuries occurring on or after August 1, 1992, where an injured worker is entitled to receive permanent partial disability benefits to the body as a whole, and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is six times the medical impairment rating

determined pursuant to the above guidelines. Tenn. Code Ann. section 50-6-241(b). If a court awards a multiplier of five or greater, then the court must make specific findings of fact detailing the reasons for its award, considering all relevant factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. section 50-6-241(c).

The trial court's award equates to one based on five times the impairment rating of the examining physician. We do not find in the record the findings required for an award of five times the medical impairment rating. Accordingly, the award is modified to one based on four times the medical impairment rating assessed by the highly qualified operating surgeon, or thirty-two percent to the body as a whole.

The remaining issue involves the claimant's compensation rate. Disability benefits are computed on a weekly basis and, subject to maximum and minimum amounts fixed by Tenn. Code Ann. section 50-6-207, are based on the employee's average weekly wages, or the earnings of injured employee in the employment in which he was working at the time of the injury during the fifty-two weeks immediately preceding the date of the injury, divided by fifty-two. Tenn. Code Ann. section 50-6-102(a)(1)(A). Days lost because of sickness or other fortuitous circumstances should be deducted. Russell v. Genesco, 651 S.W.2d 206 (Tenn. 1983). Where an employee works part time, or has been employed for less than fifty-two weeks immediately preceding the injury, his average weekly wage is ordinarily computed by dividing the total wages received during the year by the number of weeks during which the employee received wages. Jones v. Crenshaw, 645 S.W.2d 238 (Tenn. 1983).

The weekly compensation rate for an injured employee's permanent partial disability is an amount equal to sixty-six and two thirds percent of the employee's average weekly wage. Tenn. Code Ann. section 50-6-207(3)(A). The trial judge erred by finding the claimant's weekly compensation rate to be \$364.63, based on estimated future earnings.

From our examination of the record, it appears that the claimant worked 23 of the 52 weeks immediately preceding his injury, earning \$9,561.24, according to his own calculation, resulting in an average weekly wage of \$415.71, which converts to a compensation rate of \$277.14. The judgment is further modified to provide for a compensation rate of \$277.14.

Since the trial judge ordered the benefits paid in a lump sum, for which no issue is raised in this appeal, the case is remanded to the General Sessions Court of Warren County for entry of a judgment consistent herewith. Costs on appeal are taxed to the plaintiff-appellee.

Joe C. Loser, Jr., Special Judge

CONCUR:

William M. Barker, Associate Justice

William H. Inman, Senior Judge